

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
IRWIN KUSHNER	:	DETERMINATION ON REMAND DTA NO. 817039
for Redetermination of a Deficiency or for Refund of Personal Income Tax under Article 22 of the Tax Law for the Period July 5, 1997 through November 15, 1997 and for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for Period September 1, 1997 through November 30, 1997.	:	

Petitioner, Irwin Kushner, 3 Pat Malone Drive, Suffern, New York 10901, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the period July 5, 1997 through November 15, 1997 and for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1997 through November 30, 1997.

An initial determination was issued by Administrative Law Judge Arthur S. Bray on November 12, 1999. On exception, the Tax Appeals Tribunal reversed the order of the Administrative Law Judge and remanded the case for a hearing on the issue of timeliness of petitioner's request for a conciliation conference. A hearing on the issue of timeliness only was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York on December 20, 2000 at 10:30 A.M., with all briefs to be submitted by April 6, 2001 which date began the six-month period for the issuance of this determination. Petitioner appeared by Stein Riso Mantel Haspel & Jacobs, LLP (Dennis L. Stein, Esq., of counsel). The Division of Taxation ("Division") appeared by Barbara G. Billet, Esq. (John E. Matthews, Esq., of counsel).

ISSUE

Whether the Division of Taxation is entitled to summary determination on the ground that petitioner failed to file a request for a conciliation conference or a petition for a hearing before

the Division of Tax Appeals within 90 days of the issuance of the notices of deficiency and notice of determination.

FINDINGS OF FACT

1. Findings of Fact “2” through “10” were found by the Tax Appeals Tribunal in its decision of October 20, 2000.

2. In support of its motion for summary determination, the Division submitted an affidavit of its representative along with attached exhibits. In its affidavit, the Division asserts that since petitioner did not protest the notices in these matters within 90 days of the date the notices were issued, the Division of Tax Appeals lacks jurisdiction to review these notices.

3. Petitioner's petition, which was received by the Division of Tax Appeals on April 7, 1999, challenged two notices asserting deficiencies of withholding tax. It also challenged an assessment of sales tax. Two notices and demands, dated December 3, 1998, asserted deficiencies of withholding tax as follows:

Period Ended	Tax	Interest	Penalty	Payments/ Credits	Balance Due
9/27/97	\$0.00	\$0.00	\$12,303.58	\$0.00	\$12,303.58
11/15/97	0.00	0.00	5,681.07	0.00	5,681.07

According to a Consolidated Statement of Tax Liabilities, which was attached to the petition, there is also an outstanding liability of sales tax in the amount of \$164,840.95 plus interest in the amount of \$19,961.70 and penalty in the amount of \$34,597.59 less payments or credits of \$945.00 for a balance due of \$218,455.24.

4. The petition included a copy of a conciliation order, CMS No. 172456, dated January 15, 1999, which denied petitioner's request for a conciliation conference because “the notices were issued on August 10, 1998, but the request was not received until December 14, 1998, or in excess of 90 days, the request is late filed.”

5. The Division included with its motion papers a copy of its answer to the petition, dated

June 10, 1999, the affidavit of Geraldine Mahon with attached exhibits, the affidavit of James Baisley, two notices of deficiency dated August 10, 1998 and a notice of determination dated August 10, 1999.

6. As noted, the Division submitted two affidavits pertaining to the mailing of the notices. The first affidavit was that of James Baisley, the Chief Mail Processing Clerk in the Division's Mail Processing Center who attests to the regular procedures followed by the Mail Processing Center in the ordinary course of its business of delivering outgoing certified mail to branches of the U.S. Postal Service ("USPS"). Mr. Baisley states that after a notice is placed in the "outgoing certified mail" basket in the Mail Processing Center, a member of the staff weighs and seals each envelope and places postage and fee amounts on the letters. Thereafter, a mail processing clerk counts the envelopes and verifies the names and certified mail numbers against the information contained in the mail record. Once the envelopes are stamped, Mr. Baisley maintains that a member of the mail processing center staff delivers them to a branch of the United States Postal Service in the Albany area. The postal employee affixes a postmark or his or her signature to the certified mail record as an indication of receipt by the USPS. Mr. Baisley states that:

[h]ere the postal employee affixed a Postmark to every page of the certified mail record, circled the total number of pieces and initialed the certified mail record to indicate that this was the total number of pieces received at the Post Office. The U.S. Postmark on each page of the mail record is the official acknowledgment of the U.S. Post Office of the receipt of the pieces of mail recorded on the certified mail record. My knowledge that the postal employee circled the 'total number of pieces' for the purposes of indicating that 357 pieces were received at the Post Office is based on the fact that the staff of the Department's Mail Processing Center specifically request that postal employees acknowledge, on the last page of the certified mail record, the amount of items received by either 1) circling the number following the phrase 'total pieces and amounts listed' if the number of pieces received equals that listed or 2) by writing the total number received after the phrase 'total pieces received at the Post Office.' (Baisley affidavit, p. 2.)

He explains that the certified mail record becomes the Division's record of receipt by the USPS for the items of certified mail. In the Division's ordinary course of its business practice, the certified mail record is picked up at the post office the following day and delivered to the originating office by a Division staff member.

On the basis of the procedures enumerated and the information contained in Ms. Mahon's affidavit, Mr. Baisley concluded that on August 7, 1998 an employee of the mail processing center delivered three pieces of certified mail addressed to Irwin Kushner to the Colonie Center Branch of the United States Postal Service in Albany, New York in sealed postpaid envelopes for delivery by certified mail. In addition, based on his review of the documents, Mr. Baisley determined that a member of his staff obtained a copy of the postmarked certified mail record delivered to and accepted by the Postal Service on August 7, 1998 for the records maintained by the CARTS control unit of the Division. He concluded that the regular procedures comprising the ordinary course of business for the staff of the Mail Processing Center were followed in the mailing of the items of certified mail at issue herein.

7. In her affidavit, Ms. Mahon stated that as part of her regular duties she supervises the processing of notices of deficiency and determination prior to their mailing. She receives a computer printout referred to as the "certified mail record." Each of the notices is predated with the anticipated date of mailing and is assigned a certified control number which is recorded on the certified mail record.

Ms. Mahon averred that the certified mail record pertaining to the mailing at issue consisted of 33 fan-folded (connected) pages and included the 3 notices issued to Irwin Kushner on August 7, 1998. She described the certified mail record as having all pages connected when the document is delivered into the possession of the U.S. Postal Service. The pages remain connected until otherwise requested by Ms. Mahon.

8. Attached to Ms. Mahon's affidavit, as exhibit "A," is a copy of pages 1, 14 and 33 of the original certified mail record issued by the Division on August 8, 1998. The certified mailing record includes notices L015453886, L015453887 and L015453888 issued to Irwin Kushner. According to Ms. Mahon, the certified control numbers run consecutively without any deletions. There are 11 entries on each page with the exception of page 33 which contains 5 entries. Ms. Mahon notes that portions of the certified mailing record, which are attached to her affidavit, have

been redacted to preserve the confidentiality of information relating to taxpayers who are not involved in this proceeding.

The fifth paragraph of Ms. Mahon's affidavit states:

[i]n the upper left hand corner of page 1 of the certified mail record the date July 30, 1998 was manually changed to August 7, 1993. The typewritten date, July 30, 1998, was the date that the certified mail record was printed. The certified mail record is printed approximately 10 days in advance of the anticipated date of mailing of the particular Notice(s) so that there is sufficient lead time for the Notice(s) to be manually reviewed and then processed for postage, etc. by the Department's Mechanical Section. The handwritten change of the date from July 30, 1998 to August 7, 1998 was made by personnel in the Department's mail room, who changed the date so that it conformed to the actual date that the Notices and the certified mail record were delivered into the possession of the U.S. Postal Service. (Mahon affidavit, p. 2.)

Ms. Mahon further indicates that each statutory notice is placed in an envelope by Division personnel and then delivered into the possession of a Postal Service representative who affixes his or her initials or signature or a U.S. postmark to a page or pages of the certified mail record. Ms. Mahon states that in this instance a Postal Service representative initialed page 33 of the certified mail record and affixed a postmark to each of the 33 pages.

As Ms. Mahon points out, page 14 of the certified mail record indicates that notices numbered L015453886, L015453887 and L015453888 were sent to Irwin Kushner, by certified mail using control numbers P 911 008 814, P 911 008 815 and P 911 008 816. The notice numbers and the certified control numbers correspond with those found on the notices issued to petitioner on August 7, 1998. Further, Ms. Mahon's affidavit indicates that in the regular course of business and as a common practice, the Division does not request, demand or retain return receipts from certified or registered mail.

Ms. Mahon concludes that the procedures followed and described are the normal and regular procedures of the CARTS control unit.

9. As noted, in conjunction with the affidavit of Ms. Mahon, the Division offered three pages of a certified mailing record and a copy of each of the notices. On its face, the information on the certified mailing record corresponds with the description set forth in the affidavit. Among

other things, the certified mail record shows that the first sheet is labeled "NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE - ASSESSMENTS RECEIVABLE - CERTIFIED RECORD FOR ZIP + 4 MINIMUM DISCOUNT MAIL." The upper right-hand corners of the pages are numbered 1, 14 and 33, respectively. The upper left-hand corner of each page contains the printed date of "7/30/98." On the first page, this date was crossed out and a new date of "8/7/98" was written above the original printed date. Each of the three pages contains columns labeled "Certified No.," "Notice Number," "Name of Addressee, Street and P.O. Address," "Postage," "Fee" and "RR Fee." Certified numbers are listed in a vertical column on the left side of each page running successively. Page 14 contains three entries which set forth petitioner's name and address, notice numbers (L 015453886 through L 015453888) and certified control numbers (P 911 008 814 through P 911 008 816). The notice numbers and the certified control numbers correspond with those found on the notices which are attached to the affidavit of Ms. Mahon. On page 33, the "total pieces and amounts listed" is stated to be 357. Also, the number 357 is circled adjacent to the statement "total pieces received at the post office." In addition, the total fee of \$481.95 is consistent with the mailing of 357 pieces of mail at a fee of \$1.35. A stamp of "August 7, 1998" from the Colonie Center Branch of the United States Postal Service appears on each of the three pages of the certified mailing record which accompanied the affidavit of Geraldine Mahon. Initials are handwritten near the stamp on page 33.

10. As exhibit B, the Division offered copies of two notices of deficiency and a notice of determination. Each of the notices of deficiency are dated August 10, 1998 and state that withholding tax is due. The first notice of deficiency lists assessment number L 015453886, states that the total amount due is \$5,681.07 and has certified mail number P 911 008 814 printed at the top. The second notice of deficiency lists assessment number L 015453887, states that the total amount due is \$12,303.58 and has certified control number P 911 008 815 printed at the top. The notice of determination lists assessment number L 015453888, states that the total amount

due is \$205,985.10 and bears certified control number P 911 008 816.

11. In opposition to the motion for summary determination, petitioner's representative, Dennis L. Stein, Esq., states that the Division concluded that petitioner was responsible for withholding and sales tax as an officer of U.S. Bus Manufacturing, Inc. According to Mr. Stein, petitioner first received notice of this determination on or about December 3, 1998 when he received a Notice and Demand for Payment of Tax Due. This notice contained a Consolidated Statement of Liabilities for the periods ended September 27, 1997, November 15, 1997 and November 30, 1997.

Upon receiving the Notice and Demand, petitioner filed a request for a conciliation conference. The Bureau of Conciliation and Mediation Services ("BCMS") received the request on December 14, 1998. On January 15, 1999, BCMS dismissed the request as untimely finding that the time to request a conference had expired.

In his affirmation, Mr. Stein argues that neither the Baisley nor Mahon affidavits establish the general mailing procedures for mailing notices of deficiencies. After referring to the sixth paragraph of Mr. Baisley's affidavit (*see*, Finding of Fact "5"), Mr. Stein asserts that Mr. Baisley's knowledge is not based on first hand knowledge and therefore fails to establish that the circle around "357" and the initials on page 33 of the CMR were placed there by an employee of the Postal Service. Furthermore, after referring to the fifth paragraph of Ms. Mahon's affidavit (*see*, Finding of Fact "6"), petitioner's representative states:

Mahon does not supervise the mail room personnel. In fact, Mahon's responsibilities encompass the processing of notices prior to shipment to the Division's Mail Section. Rather, this supervision would presumably fall under the purview of Baisley. Yet, Baisley's affidavit is silent as to the date change. Moreover, Mahon's affidavit fails to state the basis of her presumption that the date was changed by mail room personnel. Moreover, Mahon states that '[e]ach statutory Notice is placed in an envelope by Department personnel' (see Mahon affidavit at paragraph 7). Yet, Mahon fails to identify what Department that personnel belongs to and whether she has direct knowledge of those procedures. Finally, Mahon's affidavit contains errors with regard to the manual date change of the CMR

In addition, the mailing procedures described by Mahon and Baisley fail to demonstrate a chain of custody of the CMR and the corresponding notices.

Mahon's affidavit fails to state how the notices and the CMR get from her unit to the mail unit supervised by Baisley. Mahon's affidavit also fails to describe any controls that might exist to ensure that a CMR and the corresponding notices are associated with each other and remain associated when they are forwarded to the mail room. (Citation omitted.)

Mr. Stein contends that the foregoing dates are crucial where, as here, the purported mailing date predates the date printed on the notice by three days. According to Mr. Stein, the inconsistencies prevent the Division from showing that it actually mailed the notices to petitioner. Mr. Stein concludes that as a result of the inconsistencies and lack of first hand knowledge, it is impossible to know whether the dates were changed by employees of the Division or by someone else and whether the dates were changed before or after the CMR was delivered to the Postal Service.

Petitioner also submitted an affidavit which confirmed that on or about December 3, 1998 he first received notice that the Division had determined that he was a responsible person for the withholding tax and sales tax liabilities of U.S. Bus Manufacturing, Inc. Mr. Kushner explained that he received the notice in the form of a Notice and Demand for Payment of Tax Due. Mr. Kushner further states that upon receipt of the notice, he immediately contacted his attorney and made a request for a conciliation conference. This request was denied on the grounds that he had not requested a conference within 90 days of an August 10, 1998 Notice of Deficiency. Petitioner concludes with the statement that he never received any of the notices purportedly sent on August 7, 1998 and he did not refuse to sign for any certified letters.

12. After due consideration of the motion papers, affidavits and all pleadings and documents submitted, the Administrative Law Judge determined, on November 12, 1999, that the Division established its standard procedure for issuing notices of determination and deficiency and that this procedure was followed on August 7, 1998 in regard to the notices issued to petitioner. The Administrative Law Judge then concluded that the petition was untimely, granted the Division's motion for summary determination and dismissed the petition of Irwin Kushner.

13. On exception, petitioner argued that the Administrative Law Judge erred in concluding

that the Division had met its burden of showing the standards for issuing notices of deficiency and determination and that it followed its procedures in this case. Petitioner maintained that the affidavits submitted by the Division were deficient because: the Division did not establish a chain of custody of the notices or of the certified mail record; neither affidavit was based on first hand knowledge; the Mahon affidavit did not describe the type of envelope used or identify the individual who placed the notices into the envelope; and there is no description of the controls that exist to ensure that the certified mail record and the corresponding notices are associated when the CARTS control unit receives them or when they are forwarded to the Mail Processing Center. Petitioner further contended: that the explanation of the alteration of the July 30, 1998 date on the certified mailing record misstated the year of mailing and contained information which was not based on first hand information or corroborated by the affidavit of Mr. Baisley; that the only explanation of the change of the date on the mail record came from Ms. Mahon who did not supervise the mail room personnel; that the certified mail record did not indicate how many pieces of mail were actually received at the post office on the mailing date; and, that the Division did not identify the postal employee who initialed the last page of the certified mail record or the Division employee who took the mail to the post office. Petitioner submitted that the Division should have presented an affidavit by the individual who took the mail to the post office and an affidavit by the postal employee that counted the envelopes and associated them with the certified mail record.

14. In its decision, the Tax Appeals Tribunal held that the excerpts from the certified mail record did not establish that the mailing procedure, described by Ms. Mahon and Mr. Baisley, was followed. In this regard, the Tribunal pointed out that there was no way of associating the pages of the certified mailing record which were provided. It also noted that the presence of a postmark on the page which listed petitioner's name is not sufficient to prove that an item listed on that page was delivered to the post office on the postmark date.

The Tribunal further explained that it was troubled by the Division's failure to offer

evidence that it had mailed the notices to petitioner's last known address or that the address used was the address stated by petitioner on the last return filed by him. Lastly, the Tribunal expressed concern that petitioner may have informed the Division that he had a representative prior to the date of issuance of the notices and that the representative was not served with a copy of the statutory notices.

15. On December 20, 2000, the hearing was reconvened on the issue of jurisdiction. On the basis of this hearing, the following additional findings of fact are made.

16. The notices at issue in this matter were addressed to petitioner at 1 Ackertown Road, Chestnut Ridge, N.Y. 10952-4902.

17. Petitioner and his wife filed a joint New York State Resident Income Tax Return for the year 1996. On the return, Mr. Kushner and his wife stated that their address was 1 Ackerton Road, Chestnut Ridge, New York 10952. Mr. Kushner's signature is dated August 14, 1997.

18. Petitioner and his wife filed a joint New York State resident income tax return for the year 1997 which stated that their address was 1 Ackerton Road, Chestnut Ridge, New York 10952. Petitioner's signature was dated October 14, 1998. The return included an Application for Automatic Extension of Time to File for Individuals which was dated August 13, 1998 by petitioner's representative. The application had the same address as was shown on the return to which it was attached.

19. In a letter dated December 3, 1998, petitioner's representative, Dennis L. Stein, advised the Tax Compliance Division that he was authorized to represent Mr. Kushner and was responding to a Notice and Demand dated December 3, 1998. The earliest date stamped on the letter, which accompanied a power of attorney form, is December 7, 1998. The power of attorney form stated that Mr. Kushner's address was 3 Pat Malone Drive, Suffern, New York and made reference to notice or assessment number L 015453887-3. The signatures of Mr. Kushner and the notary public were dated July 22, 1998.

20. On October 15, 1998, the firm of U.S. Bus Mfg. Co., Inc. filed a New York State

General Business Corporation Franchise Tax Return for the year 1997. The return stated that the corporation's mailing address was 3 Pat Malone Drive, Suffern, New York 10901. Mr. Kushner was the only officer listed on the return's schedule pertaining to compensation of officers.

21. Ms. Mahon is a principal clerk who supervises four units, one of which is engaged in mailing. This unit is responsible for picking up the notices with the corresponding certified mail record from the ISN department, where the notices are printed. The supervisor of the unit responsible for the mailing, Arthur Amour, receives the documents and examines them to make sure that nothing is missing. Because of the volume, Mr. Amour is not able to examine all of the documents. Rather, he usually examines the first and last document in the group. Thereafter, Mr. Amour prepares a work order known as an AD84 and clips it to the certified mail record. In this case, a box on the work order was checked for August 7, 1998 which is the date the documents were to be mailed. The notices are then taken in pallets or wagons to the mechanical section.

22. The affidavit signed by Ms. Mahon was drafted by an individual in the Department's Office of Counsel. It is Ms. Mahon's practice to read affidavits before she signs them. However, she did not check with Mr. Armour to determine what specifically happened in this case because the steps are the same for all affidavits. The procedure has never changed. Mr. Armour would have come to her if there was a problem with the procedure. Mr. Armour and Ms. Mahon are the only people who perform the mailing task at issue. Thus, if Mr. Armour was unavailable, Ms. Mahon would perform the task.

23. Ms. Mahon has no first hand knowledge of what happened when the certified mailing record involved in this matter arrived in her office.

24. The date of July 30, 1998, which is printed on the certified mailing record, is the date the document was printed. The reason for the difference in dates between the certified mailing record and the dates on the notices, i.e., August 10, 1998, is to allow extra time for a mailing in the event that an unanticipated problem, such as a printer breaking, occurs.

25. If a notice was returned by the post office it would go to the NIXIE Unit. Ms. Mahon does not have any way of knowing if a particular item is returned. Once the workers leave the certified mail record and the notices in the mail room, she does not have any personal knowledge of what happens next. Further, she does not have any personal knowledge of what the post office is told to do with the documents when the Division's employees go to the post office.

26. Mr. Baisley is responsible for interpreting the postal rules and regulations, making certain that the postal rules and regulations are followed and seeing to it that the mail is sent for the least amount of money. He does not see all of the certified mail records that go through his department. Mr. Baisley saw the certified mail record in this case for the first time in June 1999 which was at or about the time he signed an affidavit.

27. Up to 30 people process certified mail and it would be almost impossible to determine which employees processed this certified mail record.

28. The mail which Mr. Baisley's staff receives from a CARTS unit consists of the notices and the listing. The notices are in the same order as the mail log. Upon receipt of the notices and the certified mail record, a machine operator is assigned the task of using a machine to insert the notices into an envelope. Following receipt of this assignment, the machine operator, as a quality control check, will examine the first and last notices to make sure that listing corresponds with the notices. A person would not examine each of the notices contained on the certified mail record to determine if a notice was being mailed to each person listed.

29. When the notices are inserted into the machine, they are triple folded and placed into an envelope. There could be three notices for one taxpayer and six notices for another taxpayer. In order to accommodate the differences, the Division uses machines which are able to read small marks on the side of the papers which tell the machine what is the first and last pages of a notice. Postage is affixed to the envelopes as the notices are being inserted. In the process, the envelopes are sealed and a machine count of the number of envelopes is taken. When the envelopes are discharged by the machine, they are in the same order as the listing on the certified

mail record. After the notices have been run through the machine, the operator compares the number of mailings with the listing. He also compares the first and last envelopes, as well as eight randomly selected envelopes in the middle of the group against the certified mail record. If any of the ten envelopes do not match the certified mail record, the whole job is returned.

30. The machines which place the notices into the envelopes have a safety mechanism which makes the machines stop if there is a mismatch, something jams or a piece of paper is torn.

31. As a quality control check, if there are less than a certain number of pieces of mail, the number of pieces of mail will be manually counted.¹ If there is a large mailing, the machine operator will pull 10 samples which will include the first and last notices and compare them with the certified mail record. When the quality control check is completed, the notices and certified mailing record are sent to the post office.

32. If a piece of mail is not delivered, it is returned to Mr. Baisley's office. There is a record of what is returned. In anticipation of testifying at the hearing, Mr. Baisley made inquiries and determined that a NIXIE indicator had not been placed on the file indicating that the notices were not returned by the post office. He did not check for a NIXIE indicator prior to signing his affidavit in June 1999.

33. Mr. Baisley read his affidavit when it was given to him. However, he did not speak to anyone about what happened to the certified mail record. In addition, he did not review any records or make inquiries to determine if any mail sent to petitioner was returned.

34. After the quality control checks are performed, the envelopes and certified mail record are taken to the post office which performs a verification of the mail. The post office indicates on the Division's listing or its own form that it is accepting the mail through the use of a round stamp. This is the Division's certification that it delivered the notices and the certified mail record to the post office. An employee of the Division waits at the post office while an employee

¹ It is unclear what the cutoff for a manual count is. However, it appears to be either 100 or 200 pieces of mail.

of the post office stamps each sheet. The employee of the Division then returns to his office with the certified mail record.

35. Although he was uncertain, Mr. Baisley believes that it was probably a member of his staff who crossed out the July 30, 1988 date and wrote August 7, 1998 on the certified mail record.

36. At the hearing, the Division offered a complete copy of a redacted certified mail record which runs consecutively from page 1 to page 33. Pages 1, 14 and 33 of the complete certified mail record correspond with pages 1, 14 and 33 which were attached to the Division's motion. The certified mail numbers run consecutively on each page and from page to page. The original date on which the certified mail record was printed, July 30, 1998, is visible on each page. Page 14 of the certified mail record shows that 3 notices were issued to petitioner at 1 Ackerton Road, Chestnut Ridge, N.Y. 10952-4902.

SUMMARY OF THE PARTIES' POSITIONS

37. In its brief, the Division argues that by submitting the entire mail log, the defect identified by the Tribunal has been cured. The Division also argues that it has established that the notices were sent to petitioner's last known address. Lastly, the Division submits that it did not receive a power of attorney until December 7, 1998 which is approximately four months after the notices were issued.

38. Petitioner's brief argues that the testimony of Ms. Mahon and Mr. Baisley demonstrate that they did not have first hand knowledge of whether the Division's standards were followed in this case. It is submitted that their testimony was in direct conflict with their affidavits demonstrating that their affidavits were false and of no probative value. According to petitioner, this body should issue an order *sua sponte* directing the cancellation of the underlying tax assessment.

With respect to the Mahon affidavit, petitioner submits: that, in direct conflict with her affidavit, she testified that she does not personally see the mail logs when they arrive in her unit;

that she also testified that when a mail log arrives in her unit, no one matches the individual pieces of mail with the entries on the mail log; that Ms. Mahon first saw the mail log when she signed her affidavit in June 1999; that Ms. Mahon did not review anything to confirm her unit's proper handling of the mailings prior to signing her affidavit; and, that it is clear from Ms. Mahon's testimony that other than changing the names, the mail dates, addresses and tax assessment numbers, each affidavit says the same thing.

Petitioner notes that the mail log is dated July 30, 1998 at the top of each page. However, on the first page, the date is changed to August 7, 1998. The notices, which the Division contends were mailed, are dated August 10, 1998. Petitioner argues that while Ms. Mahon states that the handwritten change was made by personnel in the Division's mail room, Ms. Mahon does not supervise the mail room. Further, the statements in Ms. Mahon's affidavit about notices being placed in envelopes, being delivered into the possession of the United States Postal Service and what an employee of the Postal Service does to confirm receipt of the notices were not based upon her first hand personal knowledge. Petitioner notes that Ms. Mahon's affidavit misstates the year of mailing and contains information which is not corroborated by Mr. Baisley's affidavit or his testimony at the hearing.

Petitioner also submits that Mr. Baisley's affidavit must be rejected because his testimony conflicts with his affidavit and because he lacks first hand knowledge of whether petitioner received proper notice. Petitioner notes that Mr. Baisley testified that he never sees the mail log when it arrives in his department and that he did not see the mail log in this case until he prepared his affidavit. Petitioner submits that, in complete contradiction of his affidavit, it was Mr. Baisley's testimony that no one in his department matches the individual notices against the mail log to confirm that all of the notices contained on the mail log are available to be put into envelopes. According to petitioner, Mr. Baisley testified that he signed his affidavit without confirming that standard procedures were followed in this case and that portions of the affidavit contain false information. Petitioner further notes that Mr. Baisley explained that there is no way

to identify who actually handled the mail log in this case.

Petitioner also points out that Mr. Baisley explained at the hearing that he cannot state what procedures are followed by the post office once the Division delivers the mail log and the accompanying mail. In this regard, petitioner submits that Mr. Baisley was unable to state which postal employee's initials appear on page 33 of the mail log, whether the post office counts each envelope and matches them with the mail log or any other procedures followed by the post office regarding the certified mail. Petitioner notes that Mr. Baisley was unable to state who made the change to the mail log or when it was made.

Petitioner contends that the mailing log is flawed because it does not indicate how many pieces were actually received at the post office. Petitioner notes that Mr. Baisley could not identify the postal employee whose initials appeared on the mailing log or the name of the employee who took the mailing log and the related notices to the post office. In this regard, petitioner maintains that Mr. Baisley's testimony is contradicted by his affidavit wherein he identifies the initials on the last page of the mailing log as those of a postal employee who circled the number of pieces listed to indicate the total number of pieces received at the post office.

On the basis of the foregoing, it is contended that the Division has been unable to provide any proof that the notices contained in the mail log were actually mailed to petitioner.

39. In its reply brief, the Division argues that its motion papers, together with the additional exhibits admitted at the hearing and the testimony of Ms. Mahon and Mr. Baisley, adequately demonstrate that the notices in issue were mailed to petitioner on August 7, 1998. The Division further posits that neither the testimony of Ms. Mahon nor Mr. Baisley is materially contradicted by any portion of their respective affidavits and that there is no basis for removing either of these affidavits from the record.

CONCLUSIONS OF LAW

A. Initially, it is necessary to resolve certain factual questions. Following the hearing, petitioner requested that the Division withdraw the affidavits of Mr. Baisley and Ms. Mahon on

the ground that they contained materially false statements. In his brief, petitioner reiterates the claim that the affidavits contained statements that were directly contradicted by the testimony at the hearing. The alleged contradictory statements will be addressed in the order in which they are argued in the brief. The second paragraph of Ms. Mahon's affidavit states, in pertinent part:

As part of my regular duties I supervise the processing of Notices of Deficiency/Determination prior to shipment to the Department's Mechanical Section for mailing. *I receive a computer printout*, titled "Assessments Receivable, Certified Record for Zip + 4 Minimum Discount Mail" hereinafter referred to as a "certified mail record", and the corresponding Notice(s) of Deficiency or Determination generated by CARTS. (Emphasis supplied.)

At the hearing, Ms. Mahon testified that the mailing log does not come to her personally but to her office where a supervisor of a unit, Arthur Armour, examines the document. Ms. Mahon was uncertain whether she saw the mail log before she signed the affidavit.

B. When the affidavit is examined in context, it is clear that it does not contradict the testimony she presented at the hearing. Obviously, the statement in the affidavit that she receives a computer printout meant that the unit she supervises receives a computer printout.

It is correct that Ms. Mahon stated that all of the affidavits she prepared were similar and that she did not check to determine what happened with this particular mailing prior to signing her affidavit. However, a negative inference may not be drawn from this testimony because it simply reflects the fact that her unit follows an established procedure for each mailing.

C. Petitioner argues that Mr. Baisley's testimony was also contradicted by his affidavit. In his affidavit, Mr. Baisley states that "[a] mail processing clerk counts the envelopes and verifies the names and certified mail numbers against the information contained on the certified mail record." (Exhibit "A.")

Petitioner has accurately noted that a person does not look at each of the items contained on the CMR to determine if a notice is being sent to each person listed. However, as a quality control check, an operator will pull the first and last notices to make sure that the listing is associated with the correct job. As the notices are being inserted into the envelopes, a machine count is taken and the operator compares that number with the listing. Once the notices are

inserted and the count is verified, the outgoing signature process is conducted. If the actual number of notices is under 100 or 200 pieces, the total number of pieces will be manually counted. Ten samples will also be drawn and compared with the listing. If there are more than 200 pieces, the first and last envelopes as well as eight randomly selected envelopes are compared with the listing. On the basis of the foregoing, it is clear that Mr. Baisley's statement that a processing clerk counts the envelopes and verifies names and certified mail numbers with the information on the certified mail record is correct.

Petitioner also asserts that Mr. Baisley's affidavit is contradicted by his testimony because he stated at the hearing that he did not know what the responsibilities of the postal employees are. Again, petitioner's argument is premised upon taking Mr. Baisley's testimony out of context. Just prior to making the foregoing statement, Mr. Baisley stated that by placing an indate stamp on each sheet of the Division's form or the post office's form, the post office was verifying that it was accepting the mail from the Division. Significantly, no one specifically asked Mr. Baisley if a member of his staff requested that postal employees acknowledge on the last page of the certified mail record the number of items received by either circling the number following the phrase "total pieces and amounts listed" or by writing the total number received after the phrase "total pieces received at the post office." Accordingly, it is concluded that Mr. Baisley's affidavit is not contradicted by his testimony and that there is no basis for excluding the testimony of either Mr. Baisley or Ms. Mahon.

D. Petitioner argues that the Division's proof is deficient because the Division has not produced any evidence that the notices contained in the mail log were actually mailed to petitioner. In this regard, petitioner notes that neither Ms. Mahon nor Mr. Baisley reviewed anything before signing their affidavits and neither had any first hand knowledge that their units' procedures were followed in this case. This argument is rejected because "[t]here is no requirement to produce employees with personal knowledge of the mailing of each individual notice of determination." (*Matter of McNamara*, Tax Appeals Tribunal, January 30, 1997.)

E. Throughout his brief, petitioner has argued that many of the statements of Mr. Baisley and Ms. Mahon were not based on first hand knowledge. This is the same argument that was previously made in response to the Division's motion. As noted at that time, petitioner may not prevail by simply making this allegation. Rather, petitioner must present evidence to show that the mailing did not occur as claimed by the Division or that the Division did not follow its procedures (*Matter of Service Merchandise Co.*, Tax Appeals Tribunal, January 14, 1999). No evidence has been offered to satisfy this burden.

F. Petitioner has argued that the change in dates on the mailing log shows a serious defect in the procedure. Petitioner has noted that the notices are dated August 10, 1998 whereas the date on the mailing log was changed to August 7, 1998. Petitioner also points out that Ms. Mahon does not have first hand knowledge of who made the change to the mailing log and Mr. Baisley was uncertain as to who made the change or when it was made.

The foregoing argument is also without merit. In the absence of any showing of prejudice, defects on the face of the notice do not warrant granting petitioner relief (*see, Matter of Pepsico, Inc. v. Bouchard*, 102 AD2d 1000, 477 NYS2d 892 [notice misstating the period for which tax assessed not invalid since taxpayer not prejudiced]; *Matter of Tops, Inc.*, Tax Appeals Tribunal, November 22, 1989 [two sales tax quarters incorrectly listed on the statutory notice did not render it invalid]). Further, there is no requirement that the Division be able to identify the individual who changed the date on the certified mailing record.

G. Petitioner states that the mailing record is deficient because it does not indicate how many pieces of mail were received at the post office. This argument is specious. Mr. Baisley stated that the Division specifically requested that postal employees either circle the number of pieces or write the number of pieces on the mailing record to show the total number of pieces received. The record in this matter shows that the number 357 is circled adjacent to the phrase "total pieces and amounts listed." In addition, petitioner has not cited any authority for the proposition that the Division is required to be able to identify the particular postal employee who

received the mail.

H. The next group of issues which will be addressed is the concerns which were articulated by the Tribunal. The Tribunal was troubled by the failure of the Division to offer the complete certified mail record. In response to this concern, the Division has submitted the complete certified mail record which runs sequentially from page 1 to page 33. The certified mail numbers run consecutively on each page and from page to page. The original date on which the certified mail record was printed, July 30, 1998, is visible on each page. In view of the foregoing, it is found that each of the pages offered as the certified mail record are from the same document.

I. The Division has also established that the notices were sent to petitioner at the address which was stated on his last return (Tax Law §§ 691, 1147). Petitioner's New York State income tax return for the year 1996, which was dated August 6, 1997 by petitioner's representative, lists the same address as was used on the notices. Apparently, petitioner remained at this address for a period of time after the notices were issued because petitioner's New York State income tax return for the year 1997, which was dated October 13, 1998 by petitioner's representative, also lists the address which was used on the notices. The address of "3 Pat Malone Drive, Suffern, New York 10901," which appears on the power of attorney form and the petition, is actually the address of a corporation with which petitioner was affiliated. It is noted that petitioner has not presented any evidence or argument that the notices were sent to the wrong address.

J. The last issue is whether the Division should have mailed a copy of the notices to petitioner's representative. This, in turn, depends on whether petitioner advised the Division that he had a representative prior to the issuance of the notices. The signature of the notary public on the power of attorney form, which appointed Mr. Stein to appear on petitioner's behalf, was dated July 22, 1998. However, the cover letter which accompanied the power of attorney form was dated December 3, 1998. The earliest indate stamp on the cover letter and power of attorney form show that these documents were received by the tax compliance section on December 7,

1998. In view of the foregoing, it is determined that the Division was not on notice that petitioner had a representative until December 7, 1998 and it was not required to send petitioner's representative a copy of the notices on August 7, 1998. As before, it is noteworthy that petitioner has not presented any evidence or argument that the Division was aware that petitioner had a representative before December 7, 1998.

K. Having resolved the issues raised by the Tribunal in its decision, it is concluded that the Division has established August 7, 1998 as the mailing date of the notices to petitioner. Therefore, the Division is entitled to the presumption of receipt unless petitioner can rebut the presumption by showing that he did not receive the notices (*Matter of T.J. Gulf v. State Tax Commn.*, 124 AD2d 314, 508 NYS2d 97; *Matter of Ester Parking Corp.*, Tax Appeals Tribunal, December 18, 1997; *Matter of Montesanto*, Tax Appeals Tribunal, March 31, 1994.) Here, petitioner did not present any evidence apart from the denial of receipt which is not sufficient to rebut the presumption. (*Id.*) Accordingly, it is determined that a petition was not timely filed by petitioner.

L. It is noted that petitioner's reliance in his brief upon a certain determination of an administrative law judge is misplaced. Under Tax Law § 2010, determinations issued by administrative law judges are not precedential for other proceedings in the Division of Tax Appeals (*see, Matter of Kornblum*, Tax Appeals Tribunal, January 16, 1992, *confirmed* 194 AD2d 882, 599 NYS2d 158).

M. The Division's motion for summary determination is granted and the petition of Irwin Kushner is dismissed.

DATED: Troy, New York
September 27, 2001

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE